

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

MEDIA SCIENCES, INC.,
Debtor.

Case No. 92-5-6422-MM

MEDIA SCIENCES, INC.,
Plaintiff,

Adversary No. 92-5-526

vs.

DAVID CIRULI, DONALD KING,
AQUARIUS DISK SERVICES,
INC., and DOES 1-10,
inclusive,

Defendants.

MEMORANDUM OPINION

INTRODUCTION

Before the Court is the Motion to Dismiss Counterclaims and for Mandatory and Discretionary Abstention. For the following reasons, the motion is granted with respect to the claims asserted against the non-debtor third parties and the claim for abuse of process against the debtor, and the motion is denied with respect to the claims for breach of contract and negligent infliction of emotional distress asserted against the debtor.

FACTS

This adversary proceeding was filed by the debtor, Media Sciences, against David Ciruli, Donald King and Aquarius Disk Services. The complaint seeks declaratory and injunctive relief, turnover of property of the estate, and damages. The claims arise concerning alleged misappropriation of the debtor's equipment. The complaint was amended to add Virginia Ciruli and Mountain Bay Tek as defendants.

The defendants David Ciruli, Virginia Ciruli, and Mountain Bay Tek (collectively "Ciruli") have filed a counterclaim against the debtor and third party claims against six additional third parties: James Brain, Shizhong Chen, Scott Goodsell, Sui Li, James Ross, and Bangyi Xia. Ciruli asserts the following claims for relief: breach of employment contract; inducing breach of employment contract; intentional misrepresentation; negligent misrepresentation; slander; intentional interference with prospective business interests; negligent infliction of emotional distress; and abuse of process. The claims arise from the debtor's dismissal of David Ciruli as president of the debtor and Virginia Ciruli as vice-president of the debtor. Of the claims asserted, only three are directed against the debtor: breach of employment contract; negligent infliction of emotional distress, and abuse of process.

DISCUSSION

A. Claims Against Third Parties

The Court first addresses the claims for breach of employment contract, inducing breach of employment contract, intentional misrepresentation, negligent misrepresentation, slander, intentional interference with prospective business interests, negligent infliction of emotional distress, and abuse of process asserted against the non-debtor third parties, James Brain, Shizhong Chen, Scott Goodsell, Sui Li, James Ross, and Bangyi Xia.

28 U.S.C. § 1334(b) confers jurisdiction to bankruptcy courts over proceedings arising under title 11 or arising in or related to cases under title 11. Ciruli asserts that the counterclaims are related to the bankruptcy. The applicable standard for determining whether claims are "related to" the bankruptcy is set forth in In re Pacor:

[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankruptcy estate.

'Jurisdiction over nonbankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist.' (citations omitted).

In re Pacor, Inc., 743 F.2d 984, 994 (3d Cir. 1984). In Pacor, the Third Circuit concluded that a products liability claim by a third party against the supplier of asbestos products is not related to bankruptcy and was at best a precursor to a potential third party claim for indemnification against the debtor asbestos manufacturer. Id. at 995. The Ninth Circuit has adopted the Pacor test. In re Feitz, 852 F.2d 455 (9th Cir. 1988). In Feitz, the Ninth Circuit concluded that a claim asserted by the debtor's non-debtor spouse against a mortgagee for refusal to waive a due on sale clause is not related to the bankruptcy.

The bankruptcy court should not hear controversies between third parties not involving the debtor or the debtor's property, unless the court cannot perform its administrative duties without resolving the controversy. In re Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990). "A clear congressional policy exists to . . . have state law claims heard in state court." In re Castlerock Properties, 781 F.2d 159, 163 (9th Cir. 1986).

Federal jurisdiction exists when the resolution of non-debtor litigation may directly affect the estate's obligation to creditors whose claims are currently pending before the bankruptcy court. In re Kaonohi Ohana, Ltd., 873 F.2d 1302, 1307 (9th Cir. 1989) (emphasis added). It is unlikely that resolution of these breach of contract and tort claims against third parties will directly affect the administration of the bankruptcy estate absent a determination of vicarious liability or right of indemnification. The Court concludes that the claims are not related to the bankruptcy.

Even if the Court were to have jurisdiction under 28 U.S.C. § 1334, there are also significant reasons that the Court would decline to exercise jurisdiction over these third party claims. The relevant factors for the Court to weigh in determining whether discretionary

1 abstention is appropriate are set forth in In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir.
2 1990). See also In re Eastport Associates, 935 F.2d 1071, 1075 (9th Cir. 1991). Ciruli has
3 conceded that all of the claims are non-core, state law claims. No bankruptcy issues are involved.
4 Ciruli has asserted no other bases for federal court jurisdiction. The claims do not involve and
5 should not affect the main bankruptcy case. A consolidated trial will likely delay the resolution of
6 the original claims asserted by the debtor, and it is questionable whether Ciruli's claims against the
7 third parties would be resolved more quickly here or in a state court. Moreover, these are the
8 types of claims for which the right to jury trial traditionally exists. Most significantly, the parties
9 on both sides of these issues are non-debtors. The Court concludes that these considerations
10 weigh in favor of the Court's exercise of discretionary abstention. If the court abstains
11 where there is no pending state court action, the appropriate disposition is dismissal of the claims.
12 See, e.g., In re World Solar Corp., 81 B.R. 603, 611 (Bankr. S.D. Cal. 1988). Therefore, the
13 motion is granted in part, and the claims against the non-debtor third parties are dismissed.

14 **B. Counterclaims Against Media Sciences**

15 The Court now addresses the claims for breach of contract, negligent infliction of
16 emotional distress, and abuse of process filed against the debtor.

17 **1. Dismissal Under Rule 12(b)(6)**

18 For a defendant to prevail on a motion to dismiss under Rule 12(b)(6), it must appear
19 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
20 entitle him to relief. The purpose of a motion to dismiss under FRCP 12(b)(6) is to test the
21 formal sufficiency of the statement of the claim for relief. It is not a procedure for resolving a
22 contest about the facts or the merits of the case. 5A Wright & Miller, Federal Practice and
23 Procedure § 1356 (West 1990). In reviewing the sufficiency of the complaint, the issue is not
24 whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to
25 support the claims asserted. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Such a motion is
26 viewed with disfavor and is rarely granted. Hall v. City of Santa Barbara, 833 F.2d 1270, 1274
27 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988). Only where the pleading under attack fails to
28 meet the liberal requirement of Rule 8(a) for a short and plain statement of the claim showing that

1 the pleader is entitled to relief would the pleading be subject to dismissal under Rule 12(b)(6). 5A
2 Wright & Miller, Federal Practice and Procedure § 1356 (West 1990).

3 **2. Nature of Claims Against Debtor**

4 **a. Breach of Contract Claim**

5 Inasmuch as the debtor does not object to permitting Ciruli leave to amend the
6 counterclaim to assert the claim for the debtor's alleged breach of the employment contract to be
7 tried in this proceeding, that claim for relief may be maintained. Ciruli may have thirty (30) days
8 from the entry of this order to file an amended counterclaim.

9 **b. Negligent Infliction of Emotional Distress Claim**

10 Ciruli has pled that dismissal by the debtor has deprived him of his legally contracted
11 salary and access to the debtor's premises and has subjected him to public ridicule in the small
12 business community of which the debtor is a part. He further pleads that the dismissal has caused
13 mental anguish and emotional and physical distress. Under California law, a claim for negligent
14 infliction of emotional distress may be sustained where the plaintiff suffers emotional injury caused
15 by the conduct of the defendant. Emotional injury is defined as "mental suffering" and includes
16 nervousness, grief, anxiety, worry, shock, humiliation, indignity, mortification, embarrassment,
17 apprehension, terror, ordeal, and physical pain. Capelouto v. Kaiser Foundation Hosp., 7 Cal. 3d
18 889, 893 (1972); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433 (1967). Based on this standard,
19 Ciruli has sufficiently pled a claim for negligent infliction of emotional distress for the purposes of
20 Rule 12(b)(6).

21 **c. Abuse of Process Claim**

22 Ciruli has pled that the debtor filed the motion for contempt solely for the purposes of
23 intimidation and revenge. The elements of an abuse of process claim are an ulterior motive in
24 using the process and the use of the process in a wrongful manner. Abraham v. Lancaster
25 Community Hosp., 266 Cal. Rptr. 360, 378 (Ct. Cal. App. 1990). Abuse of process is the misuse
26 of the power of the court done in the name of the court and under its authority. Id. at 380. The
27 mere filing of a complaint cannot constitute an abuse of process. Id. at 379. Some definite act or
28 threat beyond the scope of the process is required. Id. at 378. Vexation, harassment, or bad

1 motive alone are insufficient to support a claim where process is properly used. Id. Ciruli has not
2 pled that the debtor acted beyond the scope of this proceeding or improperly filed the motion to
3 secure or compel an unauthorized advantage. The Court concludes that the pleading with respect
4 to this claim has failed to satisfy even the liberal requirements of F.R.C.P. 8(a). Ciruli may have
5 thirty (30) days from the entry of this order to file an amended counterclaim, if a claim is
6 supportable.

7 **CONCLUSION**

8 The debtor's motion to dismiss and to abstain is granted with respect to all claims asserted
9 against the third party defendants and with respect to the abuse of process claim against the
10 debtor. The motion is denied with respect to the claims against the debtor for breach of contract
11 and negligent infliction of emotional distress. The debtor may have thirty (30) days to file an
12 amended counterclaim, if necessary.

13 DATED:

14 UNITED STATES BANKRUPTCY JUDGE
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